GOH KHENG SEONG

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PULAU PINANG
VINCENT NG JC
[CRIMINAL APPEAL NO. 41-126-91]
18 JULY 1992

ROAD TRAFFIC: *Appellant driver caused death of a cyclist - Charged under s. 34A(1) of the Road Traffic Ordinance 1958 - Pleaded guilty - Facts leading to the cause of accident not substantiated by the prosecution - Exemplary sentence imposed - Whether sustainable - Road Traffic Ordinance 1958 s. 34A, (1A), (1B).*

CRIMINAL PROCEDURE: *Sentencing - Relevant factors to consider before sentencing - Principles of sentencing in road traffic offences - Whether trial Judge justified in imposing exemplary sentence - Scope of Newton hearing - Sentencer's discretionary power under s. 294 CPC.*

CRIMINAL PROCEDURE: *Whether failure to formally record the conviction occasioned failure of justice - Section 422 Criminal Procedure Code.*

WORDS AND PHRASES: *Meaning of "shall be liable" under s. 34A(1) of the Road Traffic Ordinance 1958.*

This was an appeal against conviction and sentencing of six months imprisonment under s. 34A(1) of Road Traffic Ordinance 1958 and disqualification from holding a driver's licence under s. 34A(1B) imposed by the learned Magistrate.

On 7 November 1984, the appellant, a lorry driver recklessly caused the death of a cyclist. On 8 May 1991 he pleaded guilty. The prosecution briefly stated the facts of the fatal accident but did not adduce any evidence to substantiate the charges.

The prosecution invited the Court to impose a sentence co-extensive with the offence. The trial Judge imposed the above sentences without paying attention to the facts of the case and particularly for sentencing, the circumstances and nature of the accident which would disclose the degree of culpability of the appellant was not considered.

The following issues arose for determination:

(1) Whether the appellant's guilty plea could be the basis for a stiff sentence of imprisonment.

(2) Whether the words "shall on conviction be liable" contained in s. 34A(1) implies a mandatory term of imprisonment.

(3) Whether the learned Magistrate's failure to formally enter on record the conviction of the appellant vitiated the proceedings.

(4) Whether trial Judge relied on correct sentencing principles in traffic offences cases.

Held:

[1] Despite entering a guilty plea under s. 34A(1) of the RTO 1958, the learned Magistrate ought to have called for a "*Newton trial*" to establish the facts of the case. And these facts alone could form the basis for imposing the sentence. Therefore the appellant's guilty plea alone could not suffice for sentencing.

[2] (i)The words "shall on conviction be liable to a term of imprisonment ... or to a fine or both" in s. 34A(1) clearly provides for option as to whether or not to impose a term of imprisonment or fine or both (*PP v. Hew Yew* [1972] 1 MLJ 164). Hence the sentencer could exercise discretionary powers under s. 294 Criminal Procedure Code and whenever the Penal Code provides vague, inconsistent or contradictory penal provisions it should be construed in favour of the accused.

(ii) The period of imprisonment that can be imposed by the sentencer ought to be reasonably co-relative with the earning capacity of the accused.

[3] The learned Magistrate's failure to enter or record the conviction did not occasion in any failure of justice under s. 422 Criminal Procedure Code. The lower Court's sentence was set aside and substituted with a fine of RM3,000 and appellant was disqualified from holding or obtaining a driving licence for a period of six months.

[Appeal allowed; sentence of imprisonment substituted with a fine of RM3,000.]

Cases referred to:
R v. Guilfoyle [1973] 3 All ER 844 ***(foll)***
Tan Thang Sang v. PP and Choong Sze Foong v. PP [1975] 1 MLJ 204 ***(foll)***
R v. Newton [1982] 4 Cr App R (S) 388, [1983] 77 Cr App R 13 *(foll)*
R v. McGrath & Casey [1983] 5 Cr App R. (S) 460 ***(foll)***
R v. Nabil Ahmed [1984] 6 Cr App R (S) 391 ***(foll)***
R v. Parker [1984] 6 Cr App R (S) 444 ***(foll)***
R v. Stevens [1986] 8 Cr App R (S) 297 ***(foll)***
R v. Jauncey [1986] 8 Cr App R (S) 401 ***(foll)***
R v. Williams & Ors. [1990] 12 Cr App R (S) 415 ***(foll)***
R v. Hall [1984] 6 Cr App R (S) 321 ***(refd)***
R v. Sweeting [1987] 9 Cr App R (S) 372 ***(refd)***
R v. Hawkins [1985] 7 Cr App R (S) 351 ***(refd)***
R v. Bilinski [1987] 9 Cr App R (S) 360 ***(refd)***
R v. Mudd [1988] 10 Cr App R (S) 22 ***(refd)***
R v. Ghandi [1986] 8 Cr App R (S) 391 ***(refd)***
R v. Kerr [1980] 2 Cr App R (S) 54 ***(refd)***
PP v. Hew Yew [1972] 1 MLJ 164 ***(foll)***
PP v. Man bin Ismail [1939] MLJ Rep 161; [1939] MLJ (FMSR) 207 ***(foll)***
Jayanathan v. PP [1973] 2 MLJ 68 ***(foll)***
Teo Siew Peng & 4 Ors. v. PP [1985] 2 MLJ 125 ***(foll)***
Yau Kong Kui v. PP [1989] 2 MLJ 139; [1989] 1 CLJ 1020 ***(foll)***

Legislation referred to:
Criminal Procedure Code ss. 294, 422
Penal Code ss. 302, 395
Road Traffic Ordinance 1958 ss. 32(5)(a), 34A(1), (1A), (1B), 39A(1), (2),

Other sources referred to:
Mallal's Criminal Procedure, (4th Edn.), p. 590 & 591

For the appellant - A. Suppiah; M/s. Karpal Singh & Co.
For the respondent - Ishak bin Yusoff, DPP

JUDGMENT

Vincent Ng JC:

The appellant pleaded guilty to a charge under s. 34A(1) of the Road Traffic Ordinance 1958 ("the Act") and was sentenced by the learned Magistrate to six months' imprisonment with the conviction endorsed on the driving licence under s. 34A(1A). He was also disqualified from holding or obtaining a driving licence for 12 months under s. 34A(1B) of the Act. He now appeals against sentence.

He had pleaded guilty on 8 May 1992, to the charge in respect of the road accident which occurred on 7 November 1974.

Section 34A(1) of the Act reads as follows:

> Any person who by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and use of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public causes the death of any person shall be guilty of an offence and shall on conviction be liable to a term of imprisonment not exceeding five years or to a fine not exceeding five thousand dollars or to both.

The facts of the case adduced briefly by the prosecuting officer only said that the appellant was at the material time driving motor lorry No. BN 5857 along Gelugor Road from Jelutong to Bayan Lepas when he (the appellant) knocked into the back of the deceased's bicycle while trying to overtake the latter, who was travelling in the same direction. As a result the deceased fell on the right side of the said lorry and was seriously injured and died soon after admission into Penang District Hospital. It ought to be noted here that, before sentence, no evidence - other than the aforesaid - was adduced in the Court below as to the degree of recklessness or culpability and callous disregard for the safety of other road users shown by the appellant. Neither was the sketch plan which was produced by the prosecution, (which did not indicate any brake marks on the road) of any help in this regard. Indeed, no record of conviction was made by the learned Magistrate.

Before sentence was passed the prosecuting officer merely suggested that the Court imposed a "balanced" (by the term "*setimpal*") sentence on the grounds that a life had been lost due to the accident. By the term "balanced" the prosecuting officer presumably meant a sentence co-extensive with the offence committed. In this regard, the prosecuting officer was nebulous at worst and ambivalent or equivocal at best.

In his grounds of judgment, though the learned Magistrate conceded that the case appeared to be a normal sort of road accident yet he opined that a serious view of the offence should be taken and a fine was not a suitable penalty in "reckless driving which had caused loss of a life" (in his words). He further held that it was the duty of the Court to warn other drivers of vehicles, due to the prevalence of such offence.

After careful reading of the learned Magistrate's judgment it is pertinent to note that he had paid scant regard for the facts of the particular case before him and particularly - for sentencing - the circumstances and nature of the accident which would disclose the degree of culpability of the appellant. Indeed, such vital particulars for sentencing were neither elicited by the learned Magistrate from either of the parties nor did he glean from the prosecuting officer when the latter presented the facts of the case before sentence was passed. I cannot but feel that the appellant was given exemplary sentences *in terrorem* more as a hope for deterrent to other motorists than because he had driven wilfully in a manner dangerous to the public. This is entirely contrary to the principle of sentencing and also markedly runs counter to

the principles enunciated in the English case of *R v. Guilfoyle* [1973] 3 All ER 844. As this is a landmark case on the issue of sentencing of a defendant who had caused death by dangerous driving, I shall take the liberty here to quote *in extensionem* the material parts of the judgment of Lawton LJ:

> It would appear both from a written statement which the appellant made after the accident and his evidence that he did appreciate the presence of that mini car on the road, and the Court can understand how that could come about; but it is no answer for the appellant to say, as he did, that he did not see the mini car. It was his duty, before coming out of the minor road on to the major road, to make sure that it was safe for him to do so, and as long as that mini car was there it clearly was not safe.
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> The appellant brought his lorry out of the minor road, across the carriage way of the major road, intending to turn to his right towards Wakefield. Unfortunately that manoeuvre brought him into the path of the oncoming mini car. There was a collision and all the occupants of the mini car were hurt, and the driver of it died later from his injuries.
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> As I have said, that is a very common type of accident. Clearly, on those facts, the appellant was guilty of causing death by dangerous driving and he has not sought to appeal against his conviction. What he is saying is that the penalties imposed on him, in all the circumstances, were too severe.

The *ratio decidendi* of the case being:

> Cases of this kind (that is, causing death by dangerous driving) fall into two broad categories; first, ("first definition") those in which the accident has arisen through momentary inattention or misjudgment, and secondly ("second definition") those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness.

And the sentence being:

> In the judgment of this Court an offender who has been convicted because of momentary inattention or misjudgment and who has a good driving record should normally be fined and disqualified from holding a driving licence for the minimum statutory period or a period not greatly exceeding it, unless of course there are special reasons for not disqualifying.

The above case was discussed with ready approval by Ong CJ (Malaya) in the cases of *Tan Thang Sang v. PP* and *Choong Sze Foong v. PP* [1975] 1 MLJ 204. The relevant passages are as follows:

> First, *Reg v. Downey* [1954] MLJ 148 was cited where a fine was substituted by 5 months imprisonment. It was the case of a British soldier, driving off a heavy military truck without permission, partaking of alcohol and then driving at such speed along an open straight road that he lost control and ran into a Malay family who were keeping close to the side of the road. The high degree of culpability on the part of that driver was established beyond question.
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> All the above cases were, in my opinion, proper to cite, provided that these appellants had behaved as heinously as Downey and the others. To thus equiparate the appellants with those people not only implied that these appellants deserved more condign punishment, but also a finding of "dangerous driving" indistinguishable from the conduct of those other drivers. In none of the five cases were the relevant facts set out at all. Being classed together for punishment, in total disregard of the facts of each case, it necessarily follows that these appellants had also been denied due and proper consideration of their defences and the different circumstances under which they became involved in their misfortune.
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> In my view such miscarriage of justice must be rectified. I do not think any motorist should be condemned to serve a long stretch in prison unless in the manner of his driving he had shown a culpable and callous disregard for the safety of other road users. Making scapegoats of innocent motorists is anathema to our administration of justice.

I trust therefore that the guidelines laid down by Lawton LJ in *Regina v. Guilfoyle* (*supra*) which I have recently caused to be circulated to all Subordinate Courts, will be studied and followed.

In view of the substantial rise in the number of vehicles on the road with concomitant rise in traffic accidents and road accident deaths I feel obliged in the interest of the public to discuss and endeavour here to resolve the various seemingly intractable issues faced, by the lower Court in our current case, and generally by the lower Courts when dealing with a charge under s. 34A(1) of the Act.

The issues are enumerated and dealt with as follows:

1. ***Basis for sentence in plea of guilty***

As a rule prosecutors ought to follow as closely as possible the statute in framing their charges. In the current appeal the appellant was charged as follows:

Bahawa kamu pada 7 November 1974, jam lebih kurang pukul 6.45 petang di Jalan Gelugor dalam Daerah Georgetown, di Negeri Pulau Pinang, telah menyebabkan kematian ke atas Mokun a/l Sangili penunggang basikal dengan memandu motorlori BN 5857 dengan perbuatan tiada mengendahkan suasana dalam semua keadaan (termasuk bentuk, keadaan dan kegunaan jalan, juga kesibukan kenderaan di atas jalan yang boleh dijangkakan) yang merbahaya kepada awam, dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah s. 34A(1) Ordinan Lalu Lintas Jalan Tahun 1958.

The contention of the Deputy Public Prosecutor was that, as the appellant had pleaded guilty to the aforesaid charge in terms aforesaid, it would entail the appellant having admitted that he had driven in "a reckless manner under all the circumstances which was dangerous to the public" and this could be the basis for a stiff sentence of imprisonment by the learned Magistrate.

I cannot accept that this is so. It is the very essence of criminal trial and procedure and indeed, in the interests of justice, that a line is clearly drawn between pre conviction and post conviction stages of a trial, whereby the charge forms the basis of the conviction and facts of the offence including record of previous convictions form the basis for sentence.

Surely, this is strikingly demonstrated by the established procedure which requires the facts of the offence to be adduced by the prosecution and the accused to admit or deny such facts before sentence passed. It thus stands to reason that due to the wide statutory discretion given to the Courts as regards the severity of the sentence to be meted to the accused in a criminal charge - such as in a charge under s. 34A of the Road Traffic Ordinance 1958 - the charge itself could not form the basis for sentence by the sentencer. Such basis for sentence should necessarily be the facts of the offence put forward by the prosecution as admitted or contested by the accused, for it is precisely through the availability of such facts that the sentencer could have the wherewithal to exercise his discretion as regards the severity of the sentence, within the range permitted by statute, to be imposed on the accused. It is from the facts of offence as admitted by the Court that factors which aggravates the offence are gleaned for the purpose of ordering a punitive (or, under s. 34A(1), a custodial) sentence.

Where the accused person pleads guilty to the charge in the indictment but puts forward a version of the facts of the offence which differs significantly from the version advanced by the prosecution, the Court must resolve as follows:

(a) If the version of the facts admitted by the accused so markedly or significantly differs from the prosecution's version of facts and which discloses an offence at odds with the very nature or the necessary ingredients of the charge in the indictment that he had pleaded to, the Court has to reject the plea and enter a plea of not guilty to the charge.

(b) However, if the answer to (a) is in the negative and the plea of guilty remains then the procedure to be followed are as laid out by Lord Lane CJ in the landmark case of *R v. Newton* [1982] 4 Cr App R (S) 388, [1983] 77 Cr App R 13, CSP L2.2(e), which obliges the Court to conduct a post conviction hearing to determine the factual basis for sentence, whereby the normal criminal standards of proof apply.

Newton Hearing

Where a "*Newton* hearing" takes place evidence should be called in the normal way by Counsel for the accused and the prosecution. It is an investigation of the facts of a case in order that the sentencer may be properly apprised of the actual basis upon which he should sentence. That investigation should be conducted by Counsel appearing for the accused on the one hand and for the prosecution on the other. In coming to a conclusion about the facts, the sentencer should, direct himself according to the normal criminal burden of proof (per May LJ in *R v. McGrath and Casey* [1983] 5 Cr App R (S) 460, CSP L2.2(n). The view that the proper standard to apply in order to determine the issue is the normal criminal standard, is endorsed in *R v. Nabil Ahmed* [1984] 6 Cr App R (S) 391, CSP L2.2(f), where it was said that "the accused is given the benefit of the doubt (if there is one) ... by the necessity for the Court to direct itself that the accused's account must be accepted unless the Court is sure that it is untrue" See also *R v. Parker* [1984] 6 Cr App R (S) 444, CSP L2.2(p), where it was assumed that in reviewing the findings of fact made by a Judge in the course of a "*Newton* hearing", the Court of Appeal might apply the same test as the Court would apply on a civil appeal, which would be the most favourable test for the (accused) appellant.

Where a defendant puts forward a version of the facts which differs from the case put forward by the prosecution, but his story is disbelieved after a " *Newton hearing*", it is now settled that the sentencer may properly withhold some part of the discount which the defendant would normally receive in recognition of his plea of guilty. (See *R v. Stevens* [1986] 8 Cr App R (S) 297 CSP A8.2(g); *R v. Jauncey* [1986] 8 Cr App R (S) 401 CSP A8.2(g), post, paras. 5-164; *R v. Williams & Ors.* [1990] 12 Cr App R (S) 415 CSP A8.2(g).

The Court is not obliged to hear evidence under the principles laid down in *Newton* aforesaid:

(i) Where the difference in the two versions of the facts is immaterial to the sentence, and the same sentence would be passed however the question was determined. See *R v. Hall* [1984] 6 Cr App R (S) 321 CSP L2.2(o), as where the sentence upon the prosecution version is likely to be the same as the sentence imposed if the accused's version is accepted. See *R v. Hall (supra)* and see also *R v. Sweeting* [1987] 9 Cr App R (S) 372 CSP L2.2(o).

(ii) The second exception is where the version put forward by the defence can be described as "manifestly false" or "wholly implausible". See *R v. Hawkins* [1985] 7 Cr App R (S) 351, CSP L2.2(e) and see e.g. *R v. Bilinski* [1987] 9 Cr App R (S) 360 CSP B11-2.3(A) where the appellant pleaded guilty to being concerned in the importation of 3.036 kilograms of heroin, but claimed that he had been under the impression that the substance was cannabis and also see *R v. Mudd* [1988] 10 Cr App R (S) 22 CSP L2.2(ea).

(iii) The third exception is where matters put forward by the accused do not amount to contradiction of the prosecution case but rather to extraneous mitigation explaining the background of the offence or other circumstances which may lessen the sentence. Such matters are likely to be outside the knowledge of the prosecution and the prosecution are not bound to challenge the matter put forward by the accused, by cross-examination or otherwise. See *R v. Ghandi* [1986] 8 Cr App R (S) 391 CSP L2.2(n); neither is the Court bound to accept the truth of such matters put forward by the accused. See *R v. Kerr* [1980] 2 Cr App R (S) 54 CSP L2.2(g).

Though I wish to make starkly clear here that in the interests of the motoring public and other road users the Courts should come down hard on certain motorists charged for dangerous driving, and where the facts warrant, impose custodial sentence which they may richly deserve, on a conviction under s. 34A(1) of the Act, yet it is also my view that a motorist should not be so severely sentenced unless the Court is satisfied that the accused had shown beyond question, in the manner of his driving, a high degree of culpability amounting to a wilful and callous disregard for the safety of other road users or a selfish disregard for the safety of other road users or of his passengers as accords with the second definition aforesaid of "dangerous driving" in *R v. Guilfoyle* (*supra*). See also *Tan Thang Sang v. PP and Choong Sze Foong v. PP* (*supra*) at p. 208 at H - 1st column. In short, there should be sufficient culpability on the part of the accused to justify imprisonment. This ought to be so as the Court has to bear in mind that sending a motorist to prison, especially for a substantial term, would entail his having to commune and react with characters of an entirely different ken and may thus emerge from prison metamorphised into a personality, the worse for society. Here, I am mindful of Professor TTB Kohs stimulating speech on a plea for penal reform which he delivered to the Kiwanis Club Singapore on 18 April 1972, wherein he expressed his concern about the probable "corrupting influence of the inmate sub-culture", and which is reproduced in [1972] 1 MLJ lvii. This itself is inimical to public interest.

I have committed myself to some research into and discuss in detail the *Newton* trial above, as, in my opinion the learned Magistrate had caused a miscarriage of justice when - notwithstanding a plea of guilty by the appellant in terms of the charge under s. 34A(1) of the Act - he imposed a term of *inter alia* 6 months' imprisonment without any factual basis for imposing such custodial sentence, pursuant to authorities aforesaid, and when he could have called for a *Newton* trial to establish the basis for such custodial sentence, if needed.

When presenting the facts of the charge for the purpose of sentencing, it is the duty of a competent prosecutor to craft his language in a potent, professional manner and true to facts, for the purpose of driving home, in appropriate cases, the high degree of culpability on the part of the accused, in order to secure the appropriate sentence; the duty of the Counsel for the accused to stoutly challenge, where necessary and as instructed by his client, such facts put forward by the prosecution that could have a bearing on the severity of the sentence; and the duty of the Court to conduct a *Newton* trial in such situations.

2. ***The interpretation of "shall be liable"***

Whether the words "shall on conviction be liable to a term of imprisonment ... or to a fine ... or to both" in s. 34A(1) of the Act do make a term of imprisonment mandatory. I answer this question in the negative as the wording in this section clearly provides for the option of a fine. See *PP v. Hew Yew* [1972] 1 MLJ 164. By way of an observation it is worthy to note that the words "shall be liable ... to imprisonment", with or without the option of a fine does not overrule the exercise of the sentencer's discretionary powers under s. 294 of the

Criminal Procedure Code, upon sensible interpretation of the expression "be liable". See *PP v. Man bin Ismail* [1939] MLJ Rep 161; [1939] MLJ (FMSR) 207 and see also the Federal Court (as it then was) decision in *Jayanathan v. PP* [1973] 2 MLJ 68. Indeed, it is also pertinent to note that, upon the settled principle that vague, inconsistent or contradictory penal provisions when juxtaposed one to the other, should be construed in favour of the accused, even provisions e.g. s. 302 and s. 395 (where whipping is only optional) of the Penal Code which bears the expression "shall be sentenced" rather than "shall be **liable** to be sentenced" do not debar the Courts from invoking s. 294 of the Criminal Procedure Code if the facts warrant its application. See *Teo Siew Peng & 4 Ors. v. PP* [1985] 2 MLJ 125. Whereas s. 294 may not, in my opinion be applicable to a charge under s. 39A(1) or s. 39A(2) due to the provision for imprisonment being coupled with imposition of mandatory whipping.

3. ***The length of term of imprisonment in default of payment of fine***

The question is often raised in the sentencer's mind as to the period of imprisonment to impose in the event that the accused makes default in payment of the fine ordered. In my view, such period ought to be co-extensive or at least be reasonably co-relative with the income that the accused would have earned in his then current occupation had he not opted to remain in prison. It is thus material for the sentencer to discover and make a record of the accused's income.

Application of s. 422 of the CPC

It was also raised that the learned Magistrate had failed to formally enter a record of conviction of the appellant.

After reading the record of appeal, I am satisfied that s. 422 of the CPC is clearly applicable as a complete answer to this ground of appeal as:

(a) the failure to record was a mere error of omission by the learned Magistrate;

(b) there is ample evidence from the records that the appellant had pleaded guilty and was convicted as charged; and

(c) such error of omission had not occasioned a failure of justice. See *Mallal's Criminal Procedure* (4th Edn.), pp. 590 and 591

I accordingly allow the appeal, set aside the lower Court's sentence and substitute a fine of RM3,000 or in default 6 months' imprisonment. (The record of appeal (at p. 8) shows that the appellant was earning RM500 *per mensem* at the material time of the decision in the Court below). I also order that appellant be disqualified from holding or obtaining a driving licence for the period of six (6) months with effect hereof, under s. 34A(1B) of the Act. As the accident occurred in 1974 and he was convicted in 1991 (such delay not being caused by him) and if the case in the lower Court had taken its normal time frame to complete, any order for indorsement of appellant's driving licence, if made then, would have spent its period of indorsement by virtue of s. 32(5)(a) of the Act, I make no order for such indorsement. Indeed, it is also *inter alia*, for this reason that the disqualification period of my above order is for less than the minimum 12 months' period provided under s. 34A(1B). See *Yau Kong Kui v. PP* [1989] 2 MLJ 139.

Also found at [1992] 4 CLJ 2133